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No. 893

In the Supreme Court of the United States

OCTOBER TERM, 1960

PETER LICAVOLI, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 47) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1961 (Pet. App. B, 52). A petition for rehearing *en banc* was denied on March 14, 1961 (Pet. 2). The petition for a writ of certiorari was filed on April 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether reliance upon advice of counsel is a valid defense to the charge of failure to appear before a congressional committee.

2. Whether there was fatal variance between the indictment, charging a failure to appear on July 31st, and the proof, which showed a subpoena directing appearance "forthwith" supplemented by oral instructions to appear on July 31st.

3. Whether petitioner was prejudiced by questions directed to a defense witness on cross-examination.

STATUTE INVOLVED

Section 102 of the Revised Statutes of the United States (11 Stat. 155, as amended), 2 U.S.C. 192 (52 Stat. 942) provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT

In the United States District Court for the District of Columbia, petitioner was found guilty by a jury of violating 2 U.S.C. 192 (R.S. 102) by failing to appear

in response to a subpoena to testify on July 31, 1958, in a matter under inquiry before the United States Senate Select Committee on Improper Activities in the Labor or Management Field (J.A. 114, 118, 121). He was sentenced to pay a fine of $1,000 and to serve a term of imprisonment of 6 months to begin at the expiration of a sentence he was then serving in the Eastern District of Michigan (J.A. 122). The court of appeals affirmed.

1. The facts adduced at trial through the testimony of committee personnel are as follows:

On the morning of July 28, 1958, in the lobby of the 8th floor of the Federal Building in Detroit, a subpoena was served by a Committee staff member upon petitioner. As the subpoena was handed to petitioner, his lawyer, Mr. Joseph Louisell, was heard to say in a strong voice, "Don't take that; don't take that", and then, "You had no right to serve it here" (J.A. 11-12).

The subpoena, which had been issued by the committee chairman, Senator John L. McClellan, commanded that petitioner appear before the Committee in Washington "forthwith" (J.A. 13, 123). At the bottom of the subpoena, there was typed the following notation (J.A. 14, 123):

> It is requested that you telephonically contact Mr. Robert F. Kennedy at Washington, D. C., Capitol 4-3121, extension 4828, for further instructions.

Mr. Pierre Salinger of the Committee staff, who was then in Detroit, ascertained that neither petitioner nor Mr. Louisell had been in touch with Washington and called Mr. Louisell at his Detroit office at 1 p.m. on the day of service. After Mr. Salinger identified himself

and stated that he was calling in reference to the subpoena, Mr. Louisell said that he considered the subpoena invalid because it had been served in a federal court house and that he was going to advise his client not to respond to it. When Mr. Salinger noted that it was his information that the service was valid, Mr. Louisell said that, although he was then representing petitioner in another matter (J.A. 18-19, 23), he was not sure that he would be representing petitioner in connection with the Committee hearing. Mr. Salinger told Mr. Louisell that he was calling because he knew that Mr. Louisell was petitioner's attorney. Stating that he was acting upon instructions from Washington, Mr. Salinger then asked Mr. Louisell to inform petitioner that this call would serve as the suggested contact with Mr. Kennedy (for further instructions) and that petitioner might ignore the "forthwith" reference in the subpoena, but must appear in Washington at 9 a.m. on July 31, 1958. Mr. Louisell replied that he did not know whether or not he would convey this message to petitioner (J.A. 17-21).

On the same day, at 7 p.m., Mr. Salinger again called Mr. Louisell (reached at his home) and stated that, as he had been advised by Washington that the service of the subpoena was valid, he was again requesting that petitioner appear in Washington on July 31, 1958. Mr. Louisell replied that he still considered the subpoena to be invalid. He said that he might or might not convey this message to petitioner and again noted that he was not sure that he was going to represent petitioner (J.A. 21-23, 33). Mr. Salinger stated to Mr. Louisell that, if petitioner did not appear in Washington on July 31st, he was taking

the risk of being cited for contempt of Congress (J.A. 27-28).

On the morning of July 29, 1958, Mr. Salinger dispatched by Western Union two identical telegrams addressed to petitioner—one to an address in Grosse Pointe, Michigan, the other to a box number in Tucson, Arizona (J.A. 26). The telegrams, bearing the name of Committee Chief Counsel Robert F. Kennedy as sender, stated (J.A. 24-25, 124):

> Following up on conversation with your attorney, Mr. Louisell, and pursuant to subpoena served upon you, you are hereby notified to appear in Room 101, Senate Office Building, Washington, D. C., at 9:00 a.m., Thursday, July 31, 1958.

On the same day Mr. Salinger received a telegram addressed to Mr. Kennedy from Western Union which stated (J.A. 27, 124):

> Your telegram July 29 to Peter Licavoli, 1154 Balfour, Grosse Pointe, Michigan, is undelivered. Addressee refused to accept.

On July 31, 1958, when petitioner was called as a witness by the Committee in Washington he did not respond or appear (J.A. 28-30). The Committee had no record of petitioner's having reported on July 28th, 29th, or 30th (J.A. 52, 54).

Mr. Louisell represented petitioner in subsequent communications to and from the Committee (J.A. 30-31; 125-127).

2. Mr. Louisell, testifying for the defense, corroborated the government's evidence as to the service of the subpoena and the conversations had with Mr. Salinger (J.A. 71-73). He stated that his initial

reasons for questioning the validity of the subpoena had been the manner of service and the vagueness of its language (J.A. 89). He testified that on July 28th he left a telephone message with petitioner's secretary to the effect that petitioner was not to go to Washington forthwith and that on the next day he talked by telephone with petitioner on two occasions. At this time he told petitioner that he was under no obligation to report "forthwith", as Mr. Salinger had waived that provision. He told petitioner that Mr. Salinger had requested petitioner's appearance on July 31st, but assured petitioner that he had no legal obligation to report on that date (J.A. 73-75).

In subsequent correspondence with the Committee, Mr. Louisell advised that petitioner would appear voluntarily if such appearance would preclude contempt proceedings (J.A. 125-127).

3. In its charge to the jury, the court gave the following instruction as to the meaning of the statute (J.A. 112):

> Failure to appear before a committee or a subcommittee in response to a subpoena or summons is a default within the meaning of the statute. In order to be punishable, however, the default must be willful. By the term "willful" is meant merely that a default must be deliberate and intentional and that it was not inadvertent or accidental. The word "willful" may also mean conduct marked by careless disregard of or plain indifference to the requirements of the law. The word "willful" does not mean that the failure or refusal to comply with the subpoena must necessarily be for an evil or a bad purpose or must be dishonest or in bad faith. The reason or the purpose of the failure to

> comply or refusal to comply is immaterial, so long as the failure and refusal was intentional and deliberate and was not a mere inadvertence or an accident.

Later, in discussing the evidence, the court said (J.A. 116-117):

> A member of the bar, Mr. Louisell, was called as a witness in behalf of the defendant, and he testified that he looked up the law, or thought he did, and advised the defendant that the subpoena was void, that it was not properly served, and that he, the defendant, did not have to obey it.
>
> If such advice was given, the advice was wrong, as a matter of law, and I so instruct you. Even if this advice was given, and even if it was believed, and relied upon—and there is no proof to what extent it was believed or relied upon—I instruct you, as a matter of law, that it is no defense. It is no defense to a criminal prosecution for the defendant to say, "My lawyer advised me that I could do this." A mistaken view of the law does not excuse the defendant and is no defense. And even if the defendant acted on the advice of counsel, his action may still be regarded as willful if what he did was intentional and deliberate on his part.

At the conclusion of the charge, defense counsel objected to the latter instruction and to the court's failure to give proffered instructions to the effect that the jury, if it found that the defendant acted in good faith upon the advice of counsel, (1) must acquit or (2) must take such good-faith reliance into consideration in determining willfulness (J.A. 117-118, 120, 121).

ARGUMENT

1. Petitioner acknowledges the general rule that reliance upon the advice of counsel is no defense to prosecution for a crime, and that this rule would govern a prosecution under 2 U.S.C. 192 for failure to answer a pertinent question during a congressional committee inquiry (Pet. 24). *Sinclair* v. *United States*, 279 U.S. 263. He argues, however, that since the phrase "willfully makes default" is used in the portion of the statute dealing with non-appearance, but not in the portion relating to refusal to answer, the offense of failing to appear may be defended by a showing of good-faith reliance on advice of counsel. But, as the court below noted, the use of the term "willful" in relation to non-appearance was necessary to distinguish deliberate non-appearance from accident or inadvertence. It was not necessary for purposes of describing a refusal to answer, which is by its nature deliberate. There is no occasion, therefore, to infer that Congress meant to require proof of evil motive. As Judge Learned Hand observed in *American Surety Company of New York* v. *Sullivan*, 7 F. 2d 605 (C.A. 2) at 606:

> The word "willful", even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law. * * *

This Court has rejected similar contentions that the offense of "willful default" under 2 U.S.C. 192 requires proof of evil motive. In *United States* v. *Bryan*, 339 U.S. 323, and *United States* v. *Fleischman*, 339 U.S. 349, instructions that the motive for failing to produce

records in response to a subpoena was immaterial if non-compliance was intentional and deliberate were attacked in this Court on the ground that "[i]nsofar as the respondents conducted themselves at the time of the hearing before the House Committee in reliance upon advice of counsel and upon the honest and reasonable belief that the resolution creating the House Committee was unconstitutional * * * they had no specific intent to commit a 'wilful default'." See brief for respondents in *Bryan*, No. 99, October Term, 1949, p. 31. This Court, sustaining the conviction, regarded it as sufficient that the failure to testify was "intentional" (339 U.S. at 329). See, also *Dennis* v. *United States*, 171 F. 2d 986, 991 (C.A. D.C.), affirmed on other grounds, 339 U.S. 162; *Barsky* v. *United States*, 167 F. 2d 241 (C.A. D.C.), certiorari denied, 334 U.S. 843; *United States* v. *Josephson*, 165 F. 2d 82, 85 (C.A. 2), certiorari denied, 333 U.S. 838; *Fields* v. *United States*, 164 F. 2d 97 (C.A. D.C.), certiorari denied, 332 U.S. 851.[1]

2. Petitioner contends that there was fatal variance between the indictment and the proof, arguing that, though the indictment alleged that petitioner was summoned to appear before the Committee on July 31, 1958, the proof showed that he was summoned to appear "forthwith"—which he interprets as no later than July 29, 1958.

Since the meaning of "forthwith" must be derived

[1] This is not to deny that in particular contexts the word "willful" may import criminal design or evil motive. Cases upon which petitioner relies, such as *Williamson* v. *United States*, 207 U.S. 425, and *United States* v. *Murdock*, 290 U.S. 389, fall in that category, but do not bear on the proper construction of 2 U.S.C. 192.

from context and since the word appeared on a subpoena which bore on its face the directive that telephonic contact be made for further instructions (which were in fact supplied), one cannot ascribe to the original directive the strict meaning that petitioner attaches to it.[2] In any event, it does not follow, as petitioner contends, that an oral modification of the original directive would be ineffective. See *Kamp* v. *United States*, 176 F. 2d 618 (C.A. D.C.), certiorari denied, 339 U.S. 957. Moreover, the evidence is clear that petitioner did not appear "forthwith"—not on the 28th, the 29th, the 30th or the 31st. Under these circumstances, the fact that the indictment alleged one of these dates, rather than another, could not be a source of prejudice.

3. Petitioner's claim that he was prejudiced by questions put to Mr. Louisell by government counsel requires little comment.[3] The questions were with-

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[2] It is not true, as petitioner contends, that government counsel conceded that, if the express terms of the subpoena could not be modified, the court must acquit (Pet. 37). What counsel did concede was that, if the petitioner had no knowledge of the modification, acquittal must follow (J.A. 64).

There can be no doubt, in view of Mr. Louisell's testimony, that he was in fact acting as petitioner's attorney, and that the information that the appearance date was July 31st was imparted to petitioner.

[3] The witness was questioned as to whether he had represented petitioner in other matters or before another unnamed congressional committee (J.A. 86-87). The following then occurred (J.A. 88):

"Q. On those occasions, did you have business as an attorney for other persons appearing before that Committee?

* * * *

"THE WITNESS: I did.

"BY MR. HITZ:

"Q. Do you recall whether or not on one of those occasions Mr. Salinger asked you what prospective witnesses, naming them

in the scope of the direct examination and were pertinent not only to show why the committee representative sought out Mr. Louisell in arranging for petitioner's appearance, but that the lawyer was familiar with committee procedures. The questions themselves refute petitioner's contention that they were inflamatory.

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perhaps by a designation of racketeers, you represented, which persons he stated were likely to be called before the committee?

• • • •

"THE WITNESS: I don't recall that.

"BY MR. HITZ:

"Q. Does you lack of recollection go to my entire question or merely to the phrase 'racketeers?' A. I recall a discussion that I had, I believe with Mr. Salinger in Washington with respect to a certain client whom I had represented in a civil law suit in which I had secured a judgment of four hundred thousand dollars for that client, and I recall a conversation with him concerning that client.

"Q. Did he not discuss with you other clients of yours or other prospective witnesses who might appear before the committee? A. I don't recall that.

"Q. You don't dispute that? A. I don't recall it. I couldn't dispute it, because I don't recall it.

"Q. In any one of those conversations, did you state to Mr. Salinger that, among others, Mr. Licavoli was a client of yours and had been for sometime? A. I don't recall it."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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